

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 \* \* \*

4 FORTUNET, a Nevada corporation,

5 Plaintiff,

6 v.

7 EQUBE INTERNATIONAL INC., a foreign  
8 corporation; JACK CORONEL, an individual;  
9 DEWAYNE WOOTEN, an individual; and  
PLAYBOOK MANAGEMENT, LLC, a  
Nevada limited liability company,

10 Defendants.

Case No. 2:15-cv-00312-APG-CWH

**ORDER GRANTING DEFENDANTS  
CORONEL, EQUBE, AND WOOTEN'S  
MOTIONS TO DISMISS**

(ECF Nos. 64, 74, 93, 95, 105)

11 FortuNet filed its first amended complaint against Jack Coronel, eQube International, Inc.,  
12 DeWayne Wooten, and Playbook Management, LLC, asserting violations of the Lanham Act  
13 against all defendants. FortuNet alleges that the defendants are working in concert to misuse a  
14 judgment issued in a related state court proceeding in a way that violates FortuNet's rights under  
15 Section 43(a) of the Lanham Act.

16 In addition, FortuNet brings a "work for hire" claim under the Copyright Act and seeks  
17 declaratory relief against defendants Coronel and Playbook. FortuNet alleges that all  
18 copyrightable work created on its electronic bingo system are works for hire owned exclusively  
19 by FortuNet and seeks a declaration to that effect. FortuNet also seeks a declaration that any of  
20 Coronel's pending patent applications related to certain bingo game ideas do not provide him or  
21 Playbook with any rights or protections under either patent law or any other intellectual property  
22 laws. At a hearing on February 9, 2016, I granted defendants eQube and Wooten's motion to  
23 dismiss FortuNet's original complaint but granted FortuNet's motion for leave to amend to cure  
24 the deficiencies. ECF No. 85.

25 eQube and Wooten again move to dismiss FortuNet's Lanham Act claim against them as  
26 alleged in the first amended complaint. ECF No. 95. They argue that the amended complaint  
27 does not state a plausible claim for relief under the Lanham Act and does not meet the heightened  
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1 pleading standard under Federal Rule of Civil Procedure 9(b). Coronel also moves for dismissal  
2 or summary judgment on all claims against him. ECF No. 93. He argues that FortuNet has not  
3 stated a plausible claim for relief on any of its claims. I grant both motions. Separately, Coronel  
4 has also moved for attorney's fees and costs. I deny that motion.

### 5 **I. BACKGROUND**

6 FortuNet is a manufacturer, distributor, and operator of bingo gaming equipment. ECF  
7 No. 89 at 2. It provides casinos and bingo halls with electronic bingo systems, including  
8 stationary and portable bingo player units and bingo game management systems. *Id.* Defendant  
9 eQube is also a manufacturer and distributor of electronic bingo games. *Id.* at 3. Defendant Jack  
10 Coronel is the former Chief Compliance Officer of FortuNet. *Id.* at 2. Defendant Wooten is  
11 FortuNet's former Technology Manager and Director of Business Development. *Id.* at 3.  
12 FortuNet's amended complaint alleges that after leaving FortuNet, Wooten and Coronel began  
13 working for eQube either as direct employees or paid consultants. *Id.* at 2-3.

14 The amended complaint alleges that in 2011 FortuNet learned that Coronel had, through  
15 his company Playbook, and with the help of Wooten, entered into contracts with some of  
16 FortuNet's customers wherein Coronel charged licensing fees for certain "Game Strategies"  
17 contained on FortuNet's "Bingo Star" bingo game system. *Id.* at 2-3. FortuNet alleges that the  
18 names "FortuNet" and "Bingo Star" are registered trademarks belonging to it. *Id.* at 2.

19 After learning of Coronel's licensing contracts with FortuNet's customers, FortuNet filed  
20 a lawsuit in Nevada state court against Coronel, Wooten, Playbook, and other defendants not  
21 named in this federal action, related to the marketing and selling of the Game Strategies. *Id.* at 4.  
22 FortuNet alleges that in October 2013, after a jury trial and verdict, Judge Elizabeth Gonzalez  
23 issued Findings of Fact and Conclusions of Law and Judgment on Declaratory Relief (the  
24 "October Judgment") in the state court action finding, in part, that the Game Strategies ideas are  
25 the exclusive property of defendant Coronel and/or his business entities. *Id.* at 5.

26 FortuNet alleges that Coronel has been contacting FortuNet's customers and, using the  
27 October Judgment, falsely representing that certain content on FortuNet's trademarked Bingo Star  
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1 system belongs exclusively to Coronel. *Id.* FortuNet alleges that Coronel has testified that he  
2 does not know the origin of the games contained on the Bingo Star system and was not involved  
3 in any modifications to the system. *Id.* at 3, 9. Thus, it accuses Coronel of making false  
4 statements to its customers.

5 According to FortuNet, Coronel and Wooten—either on their own behalf or as agents of  
6 eQube—are working in concert to steal FortuNet’s customers. *Id.* at 5-6. It asserts that after  
7 Coronel misrepresents the ownership of the Bingo Star games, Wooten attempts to induce  
8 customers to switch to eQube’s bingo system containing either the Game Strategies or other  
9 bingo-related products owned by Coronel, eQube, and/or Wooten. *Id.* at 6. As a result, several of  
10 FortuNet’s customers have terminated their contracts with FortuNet and signed contracts with  
11 eQube. *Id.* at 6-7.

12 FortuNet claims that the defendants are engaged in a civil conspiracy to violate its rights  
13 under the Lanham Act by making materially false and misleading statements to damage  
14 FortuNet’s reputation and goodwill with its customers and steal its business. *Id.* at 11. It alleges  
15 that the defendants are creating confusion in the marketplace regarding the true origin and  
16 ownership of FortuNet’s Bingo Star games. *Id.* at 10-11.

17 FortuNet also alleges that FortuNet’s Bingo Star system contains the original expression  
18 of the Game Strategies ideas and was created by FortuNet’s software engineers during their  
19 employment with FortuNet. *Id.* at 12. It contends that Coronel has no claimed ownership over  
20 FortuNet’s expression of the Game Strategies ideas and that all modifications to the Bingo Star  
21 software were done by FortuNet’s engineers with no input from Coronel. *Id.* at 13. It therefore  
22 claims copyright protection over the Game Strategies on its Bingo Star system based on the work  
23 for hire doctrine, and seeks a declaration to that effect. *Id.*

24 Finally, FortuNet contends that Coronel has been representing to FortuNet customers that  
25 he holds patents for the Game Strategies ideas, and that Coronel is using the October Judgment to  
26 bestow upon himself patent-like protections where none exists. *Id.* at 14. It seeks a declaration  
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1 that none of Coronel’s pending patent applications provide him or Playbook rights in FortuNet’s  
2 Bingo Star system. *Id.* at 15.

## 3 II. LEGAL STANDARD

4 A properly pleaded complaint must provide a “short and plain statement of the claim  
5 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*,  
6 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands  
7 more than “labels and conclusions” or a “formulaic recitation of the elements of a cause of  
8 action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Factual allegations must be enough to rise  
9 above the speculative level.” *Twombly*, 550 U.S. at 555. To survive a motion to dismiss, a  
10 complaint must “contain[ ] enough facts to state a claim to relief that is plausible on its face.”  
11 *Iqbal*, 556 U.S. at 696 (internal quotation and citations omitted).

12 District courts must apply a two-step approach when considering motions to dismiss. *Id.* at  
13 679. First, the court must accept as true all well-pleaded factual allegations and draw all  
14 reasonable inferences from the complaint in the plaintiff’s favor. *Id.*; *Brown v. Elec. Arts, Inc.*,  
15 724 F.3d 1235, 1247-48 (9th Cir. 2013). Legal conclusions, however, are not entitled to the same  
16 assumption of truth even if cast in the form of factual allegations. *Iqbal*, 556 U.S. at 679; *Brown*,  
17 724 F.3d at 1248. Mere recitals of the elements of a cause of action, supported only by  
18 conclusory statements, do not suffice. *Iqbal*, 556 U.S. 678. Second, the court must consider  
19 whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A  
20 claim is facially plausible when the complaint alleges facts that allow the court to draw a  
21 reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 663. Where the  
22 complaint does not permit the court to infer more than the mere possibility of misconduct, the  
23 complaint has “alleged—but it has not shown—that the pleader is entitled to relief.” *Id.* at 679  
24 (internal quotation and citation omitted). When the claims have not crossed the line from  
25 conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.  
26 “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific  
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1 task that requires the [district] court to draw on its judicial experience and common sense.” *Iqbal*,  
2 556 U.S. at 679.

3 Additionally, a complaint is subject to heightened scrutiny when it contains allegations of  
4 fraud or mistake. Federal Rule of Civil Procedure 9 requires a party to “state with particularity  
5 the circumstances constituting fraud or mistake.” Rule 9’s “particularity” standard requires a  
6 plaintiff to “identify the who, what, when, where, and how of the misconduct charged, as well as  
7 what is false or misleading about the purportedly fraudulent statement, and why it is false.” *Ebeid*  
8 *ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). This increased detail is  
9 required “to give defendants notice of the particular misconduct which is alleged to constitute the  
10 fraud charged so that they can defend against the charge and not just deny that they have done  
11 anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Thus, claims grounded  
12 in fraud or mistake must meet both the “plausibility” standard of Rule 8(a) and the “particularity”  
13 standard of Rule 9(b), ensuring they meet “Rule 8’s requirement of simplicity, directness, and  
14 clarity.” *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996); *see also Cafasso, U.S. ex rel. v.*  
15 *General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011).

### 16 **III. ANALYSIS**

#### 17 **A. Lanham Act Claim**

18 In both motions to dismiss, the defendants argue that FortuNet has not pleaded factual  
19 allegations sufficient to sustain a plausible claim for relief under the Lanham Act. They contend  
20 that whereas the previous iterations of FortuNet’s complaint specifically alleged a reverse passing  
21 off claim against the defendants, the newly amended complaint does not state under what theory  
22 FortuNet is bringing its Lanham Act claim. Rather, they contend that the newly amended  
23 complaint alleges only that Coronel, using the October Judgment and in concert with Wooten and  
24 eQube, made misrepresentations about the origin of certain content on FortuNet’s Bingo Star  
25 system which induced FortuNet’s customers to cancel contracts with FortuNet and switch to  
26 eQube. They contend that the amended complaint does not support a Lanham Act violation as  
27 there are no allegations that the defendants copied FortuNet’s system and passed it off as their  
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1 own, or that the defendants were selling their own bingo system and calling it “Bingo Star.”  
2 Thus, they argue that FortuNet does not state a claim for either passing off or reverse passing off  
3 under the Lanham Act.

4 In addition, eQube and Wooten contend that FortuNet has again failed to meet the  
5 heightened pleading requirements under Rule 9. FortuNet’s allegation is essentially that Coronel  
6 is using the October Judgment to misrepresent to FortuNet’s customers that he owns Games  
7 Strategies. The defendants argue that even assuming this was actually a false statement, the  
8 amended complaint does not give sufficient facts to put the defendants on notice of the who,  
9 what, when, where, and how of the misrepresentations.

10 FortuNet responds that the amended complaint sets forth sufficient factual allegations  
11 against the defendants to support both express passing off and reverse passing off claims under  
12 the Lanham Act. It contends that Coronel’s false representations intentionally led FortuNet’s  
13 customers and others to believe that FortuNet does not own or have a valid license to operate the  
14 Bingo Star system. FortuNet further argues that the false representations are material and  
15 harmful, and are a misuse of the October Judgment in order to confuse customers into switching  
16 to eQube’s products or services. FortuNet contends that these allegations support a claim for  
17 passing off and reverse passing off under the Lanham Act. FortuNet also argues that the amended  
18 complaint meets Rule 9’s heightened pleading standard because it is specific enough to put the  
19 defendants on notice as to the basis of the fraudulent misrepresentations.

20 FortuNet’s Lanham Act claim asserts that the defendants intentionally made  
21 misrepresentations about the ownership of certain games on FortuNet’s Bingo Star system.  
22 Because FortuNet’s claim relies entirely on alleged misrepresentations made by the defendants,  
23 the claim sounds in fraud and Rule 9(b)’s heightened pleading requirements apply. FortuNet’s  
24 amended complaint does not satisfy Rule 9(b). FortuNet has again failed to offer factual  
25 allegations regarding what specific misrepresentations Coronel made to FortuNet’s customers.  
26 The amended complaint states vaguely in multiple places that Coronel has falsely represented to  
27 FortuNet’s customers that “certain content” and, even more broadly, “the true origin of the  
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1 content” on the Bingo Star system belongs exclusively to Coronel. ECF No. 89 at 5, 7. It is  
2 unclear what content on the Bingo Star system FortuNet is referring to, or if it is referring to all  
3 content on the Bingo Star system. The amended complaint also states that the defendants are  
4 creating confusion in the marketplace regarding the “true origin and ownership of the Game  
5 Strategies ideas” contained in the Bingo Star system. *Id.* at 9. This allegation seems to limit the  
6 defendants’ alleged misrepresentations to only the specific Game Strategies at issue in the  
7 October Judgment.

8 While not relevant to my analysis at the motion to dismiss stage, FortuNet’s oppositions  
9 and its statements at the April 21, 2016 hearing on these motions contained the same  
10 inconsistencies and only furthered confusion about what exactly FortuNet is alleging that Coronel  
11 and the alleged co-conspirators told FortuNet’s customers. *See, e.g.*, ECF No. 103 at 5-8. At  
12 various times FortuNet seemed to limit the alleged misrepresentations to Game Strategies. At  
13 other times, it expanded the misrepresentations to refer vaguely to as yet undefined or identified  
14 “content” on the Bingo Star system. Thus, FortuNet has again failed “to give defendants notice of  
15 the particular misconduct which is alleged to constitute the fraud charged so that they can defend  
16 against the charge and not just deny that they have done anything wrong” as required under Rule  
17 9(b). Nor has it met “Rule 8’s requirement of simplicity, directness, and clarity.” *McHenry*, 84  
18 F.3d at 1178.

19 The original complaint was filed in February 2015, roughly 14 months ago. ECF No. 1.  
20 The parties have engaged in months of discovery. ECF No. 26. FortuNet has also been given  
21 guidance by both me and Magistrate Judge Hoffman about the deficiencies in its original  
22 complaint, and has been given the opportunity to amend to plead sufficient facts to support its  
23 claim. *See* ECF No. 52, 84, 85. The defendants contend that this is FortuNet’s sixth attempt to  
24 state a plausible claim, counting the original complaint and FortuNet’s numerous requests for  
25 leave to amend, which all contained different and sometimes conflicting factual allegations. ECF  
26 No. 95 at 2 n.1. At this stage, after months of discovery and over a year to identify facts and  
27 articulate the claim, FortuNet should be able to state with sufficient particularity the  
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1 misrepresentations and misconduct it alleges the defendants have engaged in. It has again failed  
2 to do so. I thus grant the defendants' motions to dismiss FortuNet's Lanham Act claim with  
3 prejudice.<sup>1</sup>

4 **B. Copyright Act Claim**

5 Coronel also moves to dismiss FortuNet's copyright claim, arguing that FortuNet has not  
6 stated a plausible claim for relief because it does not allege any infringement on Coronel's part.  
7 Rather, he argues, the amended complaint only seeks declaratory relief related to work done by  
8 FortuNet's software engineers that FortuNet claims to have a protected interest in, and thus fails  
9 to allege a copyright claim against Coronel. In response, FortuNet does not appear to dispute that  
10 its amended complaint does not allege actual copyright infringement by Coronel. Instead,  
11 FortuNet's opposition focuses on the declaratory relief portion of its claim and contends that the  
12 Bingo Star system software and any modifications to it were made by FortuNet's software  
13 engineers while working for FortuNet and therefore those employees' work is copyright protected  
14 under the work for hire doctrine. In reply, Coronel does not dispute that other FortuNet  
15 employees were responsible for creating FortuNet's software and any modifications to it. Thus,  
16 there appears to be no case or controversy.

17 Article III, section 2 of the United States Constitution provides that the "exercise of  
18 judicial power depends on the existence of a case or controversy." *Liner v. Jafco, Inc.*, 375 U.S.  
19 301, 306 n.3 (1964). "The case or controversy requirement subsists through all stages of federal  
20 judicial proceedings, trial and appellate, . . . [and] the parties must continue to have a personal  
21 stake in the outcome of the lawsuit." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78  
22 (1990) (internal quotations omitted). Mootness occurs when there is no longer  
23 a case or controversy. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

24 The work for hire doctrine of the Copyright Act relates to work made by employees  
25 during the course of their employment. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S.

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27 <sup>1</sup> Because I find that FortuNet has again not pleaded facts sufficient to support its claims against  
28 any of the defendants, I need not address the defendants' other arguments in support of dismissal  
and/or summary judgment.



1 730, 743 (1989). FortuNet argues its copyright claim is based on the work for hire doctrine and  
2 relates to the modification of source code on the Bingo Star system done by FortuNet's software  
3 engineers. But all parties agree that Coronel was not the author of FortuNet's software or any  
4 modifications to its source code. All parties also agree that all modifications to FortuNet's  
5 software were made by FortuNet's engineers. Thus, there is no case or controversy here based on  
6 a work for hire claim under the Copyright Act against Coronel. To the extent that FortuNet is  
7 seeking declaratory relief related to its copyright claim, I decline to exercise jurisdiction over this  
8 claim as a declaration would serve no useful purpose in clarifying or settling a legal issue in this  
9 case because there is no case or controversy. *See Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1107  
10 (9th Cir. 2011). Thus, I grant Coronel's motion to dismiss FortuNet's copyright claim with  
11 prejudice as amendment would be futile.

### 12 **C. Declaratory Relief**

13 Finally, the amended complaint contains a claim for declaratory relief related to pending  
14 patent applications of Coronel and/or Playbook. FortuNet requests a declaration that the pending  
15 applications do not provide Coronel or Playbook with "any rights and/or protections under patent  
16 law and/or any other intellectual property laws." ECF No. 89 at 15. It also seeks a declaration  
17 that FortuNet is not prohibited from "making, using, marketing, selling and/or leasing any  
18 products or services" identified in Coronel's pending patent applications. *Id.* at 16.

19 The Declaratory Judgment Act does not grant litigants an absolute right to a legal  
20 determination. *Zemel v. Rusk*, 381 U.S. 1, 19 (1965); *Pub. Serv. Comm'n of Utah v. Wycoff Co.*,  
21 344 U.S. 237, 241, (1952); 28 U.S.C. § 2201 (1982). "Federal courts do not have a duty to grant  
22 declaratory judgment; therefore, it is within a district court's discretion to dismiss an action for  
23 declaratory judgment." *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 533 (9th Cir. 2008).  
24 District courts have broad statutory discretion to decline declaratory relief. *See Wilton v. Seven*  
25 *Falls Co.*, 515 U.S. 277, 287 (1995). In determining whether to maintain jurisdiction over a  
26 declaratory judgment action, a district court can consider a variety of factors, including whether  
27 retaining jurisdiction would "serve a useful purpose in clarifying the legal relations at issue."  
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1 *Allstate Ins. Co.*, 634 F.3d at 1107; *Padres Hacia Una Vida Mejor v. McCarthy*, 614 F. App'x  
2 895, 896-97 (9th Cir. 2015). If a district court, in the sound exercise of its judgment, determines  
3 that a declaratory judgment will serve no useful purpose, it may decline the declaratory relief  
4 requested. *Wilton*, 515 U.S. at 287.

5 I have dismissed FortuNet's claims under the Lanham Act and the Copyright Act with  
6 prejudice. If Coronel violated any patent laws, then filing substantive claims alleging those  
7 violations was the appropriate course. This was not done. FortuNet's complaint does not contain  
8 substantive claims for violations of federal patent law. A declaration about Coronel and  
9 FortuNet's rights under patent law would only confuse matters further. Indeed, state court Judge  
10 Gonzalez issued such a declaration in the October Judgment and it only served to give the parties  
11 ammunition, leading to this lawsuit. It appears that what FortuNet desires is a competing  
12 judgment that it can waive around in response to the state court's October Judgment. This would  
13 only create more confusion and additional litigation and would serve no useful purpose. I  
14 therefore decline to consider the declaratory relief requested by FortuNet and grant Coronel's  
15 motion to dismiss this claim.

16 ***D. Coronel's Motion for Attorney's Fees and Costs***

17 Coronel has brought a separate motion for attorney's fees, requesting payment by  
18 FortuNet of all his attorney's fees and costs associated with this case from the date of his motion,  
19 and to hereafter pay all fees and costs going forward on a monthly basis. ECF No. 74. In support,  
20 Coronel cites to sections of Coronel's employment agreement with FortuNet, arguing that the  
21 agreement's language clearly and unambiguously entitles Coronel to attorney's fees and costs for  
22 this entire litigation. Coronel fails to provide a copy of the employment agreement in either his  
23 motion or reply, so this motion is denied as unsupported. Regardless, the motion is without merit  
24 as the employment agreement, which FortuNet attached to its opposition (ECF No. 82 at 10-17),  
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1 does not relate to or reference the claims at issue here, nor is it relevant to the factual allegations  
2 alleged in the amended complaint. Therefore, I deny this motion.

3 **IV. CONCLUSION**

4 IT IS THEREFORE ORDERED that Jack Coronel's motion to dismiss (**ECF No. 93**) and  
5 eQube and Wooten's motion to dismiss (**ECF No. 95**) are **GRANTED**. FortuNet's complaint is  
6 dismissed with prejudice.

7 IT IS FURTHER ORDERED that Jack Coronel's motion for attorney's fees and costs  
8 (**ECF No. 74**) is **DENIED**.

9 IT IS FURTHER ORDERED that FortuNet's motion to strike (**ECF No. 64**) is **DENIED**  
10 **as moot**.

11 IT IS FURTHER ORDERED that FortuNet's motion for discovery pursuant to Rule 56(d)  
12 (**ECF No. 105**) is **DENIED as moot**.

13 IT IS FURTHER ORDERED that the clerk of the court is directed to enter judgment  
14 accordingly.

15 DATED this 3<sup>rd</sup> day of May, 2016.

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18 ANDREW P. GORDON  
19 UNITED STATES DISTRICT JUDGE  
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